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No. 96-7151

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

DEBRA FAYE LEWIS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Whether Petitioner was properly charged and convicted for the murder of her four-year old stepdaughter under the Assimilative Crimes Act, 18 U.S.C. § 13, and the Louisiana Child Murder Statute, 14 La.Rev.Stat. Ann. § 30A(5).

And if not, whether the sentence was proper.

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (J.A. 64-92) is reported at 92 F.3d 1371. The denial of the Petition for Rehearing and Suggestion for Rehearing En Banc (J.A. 77) is reported at 99 F.3d 1137. The opinion of the district court denying the Motion to Dismiss Indictment (J.A. 8-18) is reported at 848 F.Supp. 692.

JURISDICTION

The Court of Appeals for the Fifth Circuit denied a Petition for Rehearing and Suggestion for Rehearing En Banc on September 16, 1996. The judgment of the Court of Appeals for the Fifth Circuit was entered as mandate

on September 24, 1996 (J.A. 63). The Petition for a Writ of Certiorari was filed on December 16, 1996, and granted on May 12, 1997. This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) The Constitution, Art. I, § 1 provides:

"All Legislative Powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and House of Representatives."

2) Relevant Louisiana criminal statutes:

14 LA.Rev.Stat. Ann. § 30
(Louisiana First degree murder Statute)

"§ 30. First degree murder

A. First degree murder is the killing of a human being:

(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, drive-by shooting, first degree robbery, or simple robbery.

* * *

(5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older.

* * *

C. Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the determination of the jury."

LA.Rev.Stat. Ann. § 30.1
(Louisiana Second degree murder Statute)

"§ 30.1 Second degree murder

A. Second degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

* * *

B. Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence."

LA.Rev.Stat. Ann. § 31
(Manslaughter Statute)

"§ 31. Manslaughter

A. Manslaughter is:

(1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or

(2) A homicide committed, without any intent to cause death or great bodily harm.

* * *

B. Whoever commits manslaughter shall be imprisoned at hard labor for not more than forty years. . . ."

LA.Rev.Stat. Ann. § 93
(Cruelty to a juvenile)

"§ 93. Cruelty to juveniles

A. Cruelty to juveniles is the intentional or criminally negligent mistreatment or neglect, by anyone over the age of seventeen, of any child under the age of seventeen whereby unjustifiable pain or suffering is caused to said child. Lack of knowledge of the child's age shall not be a defense.

* * *

D. Whoever commits the crime of cruelty to juveniles shall be fined not more than one thousand dollars or imprisoned with or without hard labor for not more than ten years, or both."

3) Relevant federal criminal statutes:

18 U.S.C. §§ 7 and 13
(Assimilative Crimes Act)

"§ 7. Special maritime and territorial jurisdiction of the United States defined

The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

* * *

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place

purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

* * *

§ 13. Laws of States adopted for areas within Federal jurisdiction

(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

18 U.S.C. § 1111
(Federal First Degree Murder statute and Second Degree Murder statute)

"§ 1111. Murder

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

(b) Within the special maritime and territorial jurisdiction of the United States.

Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life."

18 U.S.C. § 1112
(Federal Manslaughter statute)

"§ 1112. Manslaughter

(a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an lawful manner, or without due caution and circumspection, of a lawful act which might produce death.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of involuntary manslaughter, shall be fined under this title or imprisoned not more than ten years, or both;

Whoever is guilty of involuntary manslaughter, shall be fined under this title or imprisoned not more than six years, or both."

18 U.S.C. § 3553(b)
(Imposition of a sentence)

"§ 3535. Imposition of a sentence

* * *

(b) Application of guidelines in imposing a sentence.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission."

* * *

4) United States Sentencing Guidelines:

U.S.S.G. § 2A.1.1

"§ 2A.1. First Degree Murder

(a) Base Offense Level: 43"

U.S.S.G. § 2A1.2

"§ 2A1.2 Second Degree Murder

(a) Base Offense Level: 33"

U.S.S.G. § 3A1.1

"§ 3A1.1 Hate Crime Motivation or Vulnerable Victim

(a) If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by 3 levels.

(b) If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels.

(c) Special Instruction

(1) Subsection (a) shall not apply if an adjustment from § 2H1.1(b)(1) applies."

5) Relevant Federal Rules of Criminal Procedure:

Fed. Rules Cr. Proc. Rule 7, 18 U.S.C.A.

"Rule 7. The Indictment and the Information

(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

* * *

(c) Nature and Contents.

(1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts con-

stituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

* * *

(3) Harmless Error. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice."

* * *

Fed. Rules Cr. Proc. Rule 52, 18 U.S.C.A.

"Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF THE CASE

DEBRA LEWIS and her husband, James, were interviewed by FBI agents and arrested for the beating death of Jadasha D. Lowery that occurred at Fort Polk, a military base in Vernon Parish, Louisiana.

An indictment was filed on January 4, 1994 charging that DEBRA FAYE LEWIS "did, with specific intent to inflict great bodily harm, commit first degree murder of Jadasha D. Lowery, a human being under the age of twelve years, in violation of Title 14, Louisiana Revised Statutes Annotated, Section 30(5), all in violation of Title 18, United States Code, Sections 7, 13, and 2. [18 U.S.C. §§ 7, 13, and 2; La.R.S. 14:30(5)]. (J.A.4-5.)

A Motion to Dismiss Indictment (J.A. 5-7) urging the improper assimilation of a state criminal statute through the Assimilative Crimes Act (ACA) rather than by indictment under the federal homicide statutes (18 U.S.C. §§ 1111-1112) was filed on February 11, 1994 and denied by the district court in a memorandum ruling (J.A. 8-18) dated April 6, 1994. (J.A. 19.)

After a trial on March 6-10, 1995 and March 13-14, 1995, a guilty verdict to first degree murder pursuant to Louisiana law was returned against DEBRA FAYE LEWIS.

A sentencing hearing was conducted on August 22, 1995. At sentencing, the district court imposed a sentence of life imprisonment pursuant to 18 U.S.C. § 3553 and the United States Sentencing Guidelines (J.A. 41-61). Notice of Appeal was filed on August 30, 1995 (J.A. 62).

On appeal, DEBRA FAYE LEWIS urged that her federal prosecution by assimilation of the Louisiana first degree murder statute through the ACA was improper and that the conviction should be reversed and the matter remanded for a new trial. Petitioner contended that a specific federal criminal statute existed (federal murder statute) and that to authorize the assimilation of a state criminal statute allowed prosecution for a crime already made criminal under a specific applicable federal statute, the assimilation may lessen the burden of proof or change the elements of a crime required to be proven to obtain a conviction, and the assimilation sought to impose a penalty allowed by state law which was not provided by federal

law, if charged under the appropriate federal criminal statute.

The Court of Appeals held that the assimilation of the Louisiana first degree murder statute was improper under the ACA and the indictment was invalid. The Court of Appeals reviewed the state and federal statutes in light of the "precise acts" test set forth by this Court in *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946) and found that the conduct sought to be prosecuted was prohibited by applicable federal statutes; therefore, the ACA could not be used to charge, prosecute, and convict someone under a state criminal statute in lieu of the federal criminal statute prohibiting the same criminal conduct. The court concluded that the Louisiana first degree murder statute "filled no gaps" in existing "federal law, but, on the contrary, would impermissibly enlarge the scope of the federal murder statute.

Notwithstanding the fact that the Court of Appeals held that the ACA could not be used to prosecute the petitioner under a Louisiana criminal statute, and the indictment itself was invalid, it affirmed the conviction of the defendant under the analogous federal crime of second degree murder (18 U.S.C. § 1111(a)) and affirmed the sentence of life imprisonment originally imposed. The Court of Appeals held that the citation and reference to the Louisiana first degree murder statute was "harmless error." The court reasoned that the indictment placed the petitioner on notice of the "murder" charge against her and that a new trial would not be necessary. The court dismissed petitioner's arguments that the federal criminal statute required a different criminal element than the Louisiana statute and further rejected petitioner's arguments that the difference in criminal elements required for conviction under federal law as compared to state law were prejudicial to the defendant and required a new trial. The Court of Appeals reasoned that the federal crime of second degree murder, 18 U.S.C. § 1111(a), was analogous with and equivalent to Louisiana first degree murder;

it then held that the evidence supported a conviction under the federal murder statute, and entered a judgment of conviction of federal second degree murder.

The Court of Appeals affirmed a sentence of life imprisonment. It reasoned that because the crime of federal second degree murder carried a maximum statutory penalty of up to life imprisonment, the sentence imposed by the trial court under the Louisiana first degree murder statute was within the statutory maximum; therefore, a remand for resentencing was unnecessary.

SUMMARY OF THE ARGUMENT

The Assimilative Crimes Act was enacted to allow the federal government to fill in the gaps in existing federal criminal statutes by assimilating or using state criminal statutes to prosecute offenders for acts occurring on federal enclaves where there is no federal criminal law or statute directly punishing the offender's conduct. In order for a federal prosecution to assimilate or use a state criminal statute in its prosecution, the following must exist: 1) the offense sought to be punished must have occurred on a federal enclave or on ". . . land reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, . . ." (18 U.S.C. § 7(3); and, 2) the conduct or act sought to be made punishable "*. . . although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the state . . . in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.*" (18 U.S.C. § 13 emphasis added.)

It is improper to prosecute a defendant in federal court for conduct which occurred on a federal enclave under state law when a federal criminal statute proscribes that precise conduct.

The Court of Appeals properly held that the federal murder statutes proscribed the precise conduct charged, and that the assimilation of the Louisiana first degree murder statute and subsequent prosecution of petitioner under that assimilated state statute was improper. The Court of Appeals correctly held that the indictment was invalid; however, the court erred in holding that the invalid indictment was a "flawed assimilation" and constituted "harmless error," thereby permitting affirmance of a conviction of federal second degree murder and the sentence of life imprisonment.

After concluding that the indictment was invalid, the conviction should have been reversed and the case remanded for a new trial under the appropriate federal criminal statute. The federal homicide statutes and the Louisiana murder statutes provide their own statutory framework and scheme defining the criminal conduct constituting the offense, the specific factors or characteristics of the offense, the specific elements of proof required to convict an offender of that offense, and the punishment for the offense.

The invalid indictment carried with it a prosecution of petitioner under the Louisiana first degree murder statute.

In the event this Court holds that the prosecution under the ACA was improper, but the conviction under the analogous federal second degree murder statute proper, this court must reverse the sentence and remand for resentencing. Sentencing under the federal sentencing guidelines is mandatory. The Court of Appeals affirmed a sentence of life imprisonment stating that it was within the maximum statutory penalty even though it exceeded the maximum sentencing guideline range applicable to the "analogous" federal crime upon which petitioner was convicted.

Both the district court and the Court of Appeals were obligated to apply the sentencing guidelines for federal second degree murder. They did not. The Court of

Appeals affirmed the trial court's sentence of life imprisonment that was based upon the sentence mandated by the Louisiana first degree murder statute and the analogous sentencing guideline for federal first degree murder which the trial court found applied to the conviction under Louisiana law. Under this Court's previous rulings, the statutory maximum sentence is the "maximum sentencing guideline range." Here, the maximum guideline range, including an enhancement for a vulnerable victim, was 210 months. The sentence imposed exceeded the maximum under the sentencing guidelines and must be reversed and the matter remanded for resentencing pursuant to the sentencing guidelines.

ARGUMENT

INTRODUCTION:

The Court granted petitioner's writ of certiorari, limited to the following questions:

- (1) whether the petitioner was properly charged and convicted for the murder of the four-year-old stepdaughter under the Assimilative Crimes Act, 18 U.S.C. § 13, and the Louisiana child murder statute, 14 La.Rev.Stat. Ann. § 30A(5); and (2) if not, whether the sentence was proper?

I. THE FIFTH CIRCUIT CORRECTLY CONCLUDED THAT THE GOVERNMENT IMPROPERLY INVOKED THE ASSIMILATIVE CRIMES ACT TO CHARGE AND CONVICT PETITIONER OF MURDER IN FEDERAL DISTRICT COURT BASED UPON A LOUISIANA STATUTE.

The indictment in this case charged DEBRA FAYE LEWIS with first degree murder under the Louisiana first degree murder statute, 14 LA.Rev.Stat. Ann. § 30A(5) pursuant to the Assimilative Crimes Act (ACA) 18 U.S.C. Sections 7, 13, rather than under the federal murder statute, 18 U.S.C. § 1111. The Assimilative Crimes Act provides:

"§ 7. Special maritime and territorial jurisdiction of the United States defined

The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

* * *

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

* * *

"§ 13. Laws of States adopted for areas within Federal jurisdiction

(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States, not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof

in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

The Federal Government can use the ACA to prosecute a defendant for a crime committed on federal property when the act (crime) is not made punishable by an act of Congress but is punishable under state law. This allows federal prosecutors to use state laws "to fill in the gaps" where no federal criminal statute exists.

Defendant filed a Motion to Dismiss Indictment based upon the improper use of the ACA which was denied by the district court. The trial court in denying the Motion to Dismiss Indictment stated that the federal murder statute did not cover the "precise act" as did the state statute, and the state statute prosecuted child abuse whereas the federal murder statute did not (J.A. 8-18). This is an erroneous interpretation of Louisiana law and the ACA.

The federal murder statute, 18 U.S.C. Section 1111, defines first and second degree murder as follows:

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

(b) Within the special maritime and territorial jurisdiction of the United States.

Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life."

Whereas the Louisiana first degree murder statute, 14 LA.Rev.Stat. Ann. § 30A (5) provides a definition for first degree murder as follows:

"A First Degree Murder is the killing of a human being:

5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve years."

The Court of Appeals held that the assimilation of the Louisiana murder statute was improper under the ACA as it failed to meet the "precise acts" test as elucidated by this Court in *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946), but that the evidence adduced at trial was sufficient to uphold a conviction of the crime of federal second degree murder (J.A. 64-92).

The only difference between the prohibited conduct of the two statutes is that the Louisiana statute provides if a murder is committed upon a member of a specific category of individuals (a victim under the age of twelve years) the conviction is for first degree murder. However, the federal statute does not define first degree murder by age classification. If the elements of the crime are met, it applies to all victims, regardless of age. It is obvious from reading the federal and state criminal statutes that the federal murder statute covers all human beings regardless of age. The "precise act" prohibited, murder, is committed if the requisite elements of the crime have been perpetrated.

The government in its brief in opposition to the Petition for Writ of Certiorari urged that the Louisiana murder statute punishes child abuse which was not specifically

prohibited by the federal murder statute. (Pet. Opp. 11-14.) As such, the argument goes, the Louisiana crime of murder of a child under the age of twelve is not the precise act prohibited by the federal murder statute: the killing of a human being. This begs the question. The State of Louisiana has another applicable statute which deals with cruelty to juveniles.¹ Obviously, the government could have prosecuted the defendant under the federal second degree murder statute and assimilated the state cruelty to juveniles statute as a separate charge had it so desired [see *United States v. Brown*, 608 F.2d 551 (5th Cir. 1979)]. But, in this case the purpose for the assimilation was to try DEBRA FAYE LEWIS in federal court for a state crime of first degree murder which carried a greater penalty (sentence) than the only applicable federal statute, second degree murder. This prosecution was not to further the state's interest in deterring child abuse.

The ACA cannot be used to expand federal law or to supplement federal law to allow prosecution under a state law which either more broadly defines or more severely penalizes the same offense. In *Williams*, supra, the government sought to prosecute Mr. Williams under an Arizona criminal statute for statutory rape. Arizona law provided that any sexual intercourse with a female under the age of eighteen met the definition of statutory rape. The alleged rape occurred on an Indian reservation which was a federal enclave and land under the exclusive control of the United States. However, the federal criminal statutes punished carnal knowledge of a minor girl and required as an element of the offense that the prohibited act must be with a woman under the age of sixteen. The Arizona criminal statute more broadly defined the crime sought to be prosecuted. This Court held that the ACA could not be used to re-define or enlarge a crime. Furthermore, this Court held that the ACA did not make the Arizona statute applicable because the "precise act" upon which the con-

¹ See, 14 LA.Rev.Stat.Ann. § 93 Cruelty to Juveniles, *infra* p. 4.

viction depended had been made penal by an Act of Congress when it defined adultery. This principal is applicable to the case at bar and underscores the Court of Appeals' proper rejection of the government's attempt to assimilate the Louisiana first degree murder statute to the instant prosecution. Congress defined first degree murder,² second degree murder,³ and manslaughter⁴ under the federal homicide statutes. The State of Louisiana has its own statutory scheme defining homicide into first degree murder,⁵ second degree murder,⁶ and manslaughter⁷ which differ in definition and scope from those of the federal government. The federal government cannot prosecute a defendant under a state criminal statute if the crime for which it seeks to prosecute that defendant is defined by Congress and is made penal by an act of Congress. The Constitution provides that "[a]ll Legislative Powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. Art. I § 1. In the case at bar, the crime of murder has been defined by Congress and is a criminal act which is proscribed by specific legislative acts, the federal homicide statutes.

The 6th Circuit Court of Appeals in *United States v. Griffith*, 864 F.2d 421 (6th Cir. 1980) grouped the ACA into four categories of cases. The first group finds all actions are criminal under federal law are also criminal under state law, but state law makes other acts criminal as well. In this group of crimes, all that may be different is a definition of one of the elements of the crime as in

² 18 U.S.C. § 1111.

³ 18 U.S.C. § 1111.

⁴ 18 U.S.C. § 1112.

⁵ 14 LA Rev.Stat.Ann. § 30.

⁶ 14 LA Rev.Stat.Ann. § 30.1.

⁷ LA Rev.Stat.Ann. § 31.

Williams, supra, the age of consent, or the federal statute may require an additional proof requirement that is not required in the state statute. Merely because there is a different definition or that the federal statute may require different elements of proof does not make the state law available through the ACA. This reasoning takes into consideration that under federalism, each state may determine which acts it deems criminal and it may define that crime in its own way and set out the particular elements of each crime. But, this unique form of government does not allow each state to re-define a federal criminal statute or make criminal an act on a federal enclave that Congress has not prohibited by a legislative act.

In the second group of cases, the federal law encompasses a broader area than the state law, but usually the state law carries greater penalties or greater ease of proof. In these cases, the federal law already occupies the field and the courts have held that the ACA cannot be used to enhance punishment or facilitate a conviction.

The third group includes cases where state and federal laws overlap to a degree but each occupies an area not covered by the other statute. In those cases, prosecution could be maintained either under the federal or state law. The reason state law can be used is because the two competing statutes have two completely different theories of criminal conduct involved. A case along that line was *United States v. Brown*, 608 F.2d 551 (5th Cir. 1979) which held that a state child abuse statute better fit the facts of a case than the federal assault statute.

The last group of cases is where there are overlapping state and federal laws. However, in this group of cases, an act may be a crime under a state law, but not under federal law. This may be that under one statute or the other, specific intent is required or some other act or element of proof which is not found in the other statute.

Contrary to the holding of the Fifth Circuit, the case at bar falls in the first group of cases. The government

seeks to prosecute DEBRA FAYE LEWIS under the Louisiana first degree murder statute because it facilitates conviction and lessens its burden of proof. In more than one way, the state statute makes it easier for the prosecution to prove its case. First, all the prosecution has to prove under the state statute is that the defendant has either specific intent to kill *or* specific intent to inflict great bodily harm (emphasis added) and prove that the victim was under the age of twelve years. Under the federal murder statute, the prosecution is required to prove the unlawful killing of a human being with malice aforethought. This requires specific intent to kill which a jury might infer to be a different standard of proof than an intent to inflict great bodily harm.⁸ From reading the trial testimony, it is clear that neither DEBRA FAYE LEWIS or her husband had the specific intent to kill the child, Jadasha D. Lowery. Under the state statute, the prosecution need only prove the intent to inflict great bodily harm, the child died, and the child was under the age of twelve. This would allow a conviction for first degree murder under the state statute, but not under the federal first degree murder statute which requires a finding of premeditation with malice aforethought and that the death occurred during the commission of one of the prohibited acts set forth in the statute.

⁸ Although the question whether the use of the state statute in place of the federal statute deprived the defendant of any trial defenses causing her prejudice was not granted in petitioner's Petition for Certiorari, defendant contends that the use of the Louisiana murder statutes denied her the ability to fully argue a diminished capacity defense which is appropriate under a federal prosecution. This concern is even more poignant in that DEBRA FAYE LEWIS sought to introduce evidence of Battered Women's Syndrome to overcome the malice aforethought element required in a federal murder prosecution. Certainly, diminished capacity may disprove conduct which is "reckless and wanton and a gross deviation from a reasonable standard of care, or of such a nature that the fact finder is warranted in inferring that the defendant was aware of a serious risk of death or serious bodily injury." (See *United States v. Ryan*, 9 F.3d 660, 671-2, n.11).

Tied into this is the penalty aspect of the case. Because the burden of proof is more difficult under the federal first degree murder statute, it is likely that a conviction for federal second degree murder or manslaughter might be returned. Under the Louisiana murder statutes, if a first degree murder conviction is not returned, the jury can convict on second degree murder or manslaughter. Under the state murder statutes, first degree murder carries a penalty of death or life in prison, second degree murder carries a penalty of life in prison, and manslaughter carries a penalty of up to forty years in prison.⁹ Under the federal murder statutes, first degree murder carries a penalty of death or life in prison, second degree murder carries a penalty of any term of years or for life, and manslaughter is divided into voluntary manslaughter which carries a penalty of up to ten years in prison and involuntary manslaughter carries a penalty of up to six years in prison.¹⁰ Clearly, the prosecution under the state criminal statute was an attempt to guarantee an enhanced penalty, even if a responsive verdict was returned. The purpose of the ACA is not to allow a federal prosecutor to choose between federal and state criminal statutes to determine which one might afford an easier burden of proof or a more severe penalty for the crime. The purpose of the ACA is to allow a federal prosecution for conduct occurring on a federal enclave under state law, provided there is no federal criminal statute prosecuting that precise conduct. The conduct proscribed by the federal murder statute is the "precise act" which is sought to be prosecuted under state criminal law: murder of a human being. Neither the prosecutor nor the trial judge is allowed to forum shop based upon whether a federal or state criminal statute is used. A prosecution in federal

⁹ See brief, *infra*, p. 3.

¹⁰ See brief, *infra*, p. 7. Further, 18 U.S.C. § 1112, the manslaughter statute was amended by Pub.L. 102-322 to increase the term of imprisonment from three years (as it was at the time of the instant offense) to six years.

court should be based upon conduct occurring on a federal enclave in violation of a federal statute, and only in the absence of a federal statute prohibiting the conduct, should the government assimilate a state criminal statute. The prosecutor is not entitled to invoke the ACA to prosecute DEBRA FAYE LEWIS under a state criminal statute when an applicable federal criminal statute prohibiting the conduct sought to be punished exists.

In *United States v. Griffith*, *supra*, the court held that the ACA could be used to prosecute Mr. Griffith under state law for shooting a person while hunting on a federal military reservation. The federal assault statute required specific intent whereas the applicable state statute provided only for reckless assault. The court found that the ACA was applicable in that case because under the *Williams* Doctrine, reckless shooting in the case before it would not be a crime under the federal law, but was a crime under state law. The court further found that this result was clearly intended under the ACA because Congress enacted the ACA to "use local statutes to fill in gaps in the Federal Criminal Code." If the applicable federal law does not prescribe the "precise act" (crime) which is sought to be punished, then state law may be assimilated to fill in the gaps. Where there are no gaps to be filled in, state law cannot be used for purposes of obtaining an enhanced penalty or to facilitate conviction.

In *United States v. Brown*, 608 F.2d 551 (5th Cir. 1979), the court found that the ACA could be used to charge Ms. Brown with child abuse pursuant to Texas law rather than simple assault under the federal assault statute. In *Brown*, *supra*, the court found that the state abuse statute closely fit the facts of the case because the child had been abused rather than simply assaulted. The court distinguished the decision in *Williams*, *supra*, by stating that the court was not trying to enlarge the scope of the penal offense prescribed by the Congress by apply-

ing a conflicting state definition under the ACA. In *Brown*, supra, the court found that the "precise act" was not prohibited by the federal statute, but was prohibited by the state statute. Therefore, the ACA could be invoked to charge Ms. Brown with child abuse.¹¹

In *United States v. Patmore*, 475 F.2d 752 (10th Cir. 1973), the court reversed a conviction for an assault by the defendant while in prison at Leavenworth, Kansas, federal penitentiary. Mr. Patmore was indicted in federal court for aggravated battery pursuant to a Kansas statute through the ACA. Patmore contended that the federal assault statute applied in his case. The court found that Patmore was correct and he should have been prosecuted under the federal statute and not the state statute. The difference between the two statutes was that the federal statute required intent to do bodily harm whereas the Kansas statute made no mention of any specific intent. Even though there was a difference in the elements of proof required, the court held that where a federal statute defined the crime, it could not be re-defined by application of the ACA in adopting a state Statute.

This should not be confused with those cases in which the courts have allowed the use of the ACA to adopt portions of a state statute or law which does not overlap federal law, even though the general state law may overlap federal law to a certain extent. The basis for this is that the particular portion of state statutes adopted go to conduct or crimes which were not defined or proscribed by a specific federal statute. Examples of these cases involve defendants charged with sexual assault or some sex offense under state law, whereas the only applicable federal statute is an assault offense. Because the state sex offense statutes

¹¹ Petitioner does not deny that she could have been charged with two separate offenses: federal second degree murder, 18 U.S.C. § 1111(a), and cruelty to juveniles pursuant to Louisiana law, 14 LA Rev.Stat. Ann. § 93. See also, *United States v. Fesler*, 781 F.2d 384 (5th Cir. 1986).

are normally very specific as far as the relevant conduct of the defendant is concerned, and the federal assault statute is general in nature and does not proscribe those particular acts, the courts have found that it is not a violation of the ACA to allow prosecution under a particular state statute. See *United States v. Eades*, 633 F.2d 1075 (4th Cir. 1980); *United States v. Smith*, 574 F.2d 988 (9th Cir. 1978) in which convictions under state law were valid even though there was a federal rape statute when the rape statutes specifically made acts of sodomy penal in nature. Congress has sought to invoke distinctions in drafting these criminal statutes. Had Congress wanted to make similar distinctions or categories in the murder statutes, it could have done so. Its silence, in no way renders the federal murder statutes less forceful.

Also going to the heart of this discussion is the fact that once a state statute is assimilated by the ACA, then its penalties are also imposed upon the defendant.¹² Clearly, in the case at bar, the attempt by the prosecution to use the Louisiana first degree murder statute and its penalties was an attempt to obtain a greater punishment in case the defendants were not found guilty of first degree murder. This is not appropriate. This Court in *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497, 100 L.Ed. 640, 76 S.Ct. 477 (1956) referred to Justice Holmes' statement in *Charleston & Western Carolina R. Co. v. Vanville Furniture Co.*, 237 U.S. 597, 604, 35 S.Ct. 715, 717, 59 L.Ed. 1137 in affirming the dismissal of a sedition prosecution under state law whenever a federal criminal statute proscribed the same conduct:

"When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help

¹² *U.S. v. Johnston*, 876 F.2d 589 (7th Cir. 1989), certiorari denied, 493 U.S. 953, 107 L.Ed.2d 350, 110 S.Ct. 364 (1989); *U.S. v. Binder*, 769 F.2d 595 (9th Cir. 1985). U.S.S.G. § 5G1.1(b).

because it attempts to go farther than Congress has seen fit to go." (Id. at 350 U.S. 497, 504, 76 S.Ct. 477, 481).

The federal murder statute clearly proscribes and penalizes the exact conduct upon which the defendant was charged by the state criminal statute. As such, the holding of the Fifth Circuit finding an improper assimilation of the Louisiana murder must be affirmed and this matter remanded to the Court of Appeals with instructions to vacate the sentence of life imprisonment without parole and to remand the case to the district court for resentencing.

II. A SENTENCE OF LIFE IMPRISONMENT FOR CONVICTION OF SECOND DEGREE MURDER UNDER 18 U.S.C. § 1111 EXCEEDS THE MAXIMUM SENTENCING GUIDELINE AND IS PREJUDICIAL TO THE DEFENDANT.

The Fifth Circuit affirmed petitioner's conviction under the analogous federal statute of second degree murder and further affirmed the sentence of life imprisonment by finding that the sentence imposed by the district court did not exceed the statutory maximum sentence the defendant could have received under 18 U.S.C. § 1111. 93 F.3d 1371 at 1379. The Fifth Circuit found that DEBRA FAYE LEWIS was not prejudiced by her conviction through the Assimilative Crimes Act for Louisiana first degree murder nor by its subsequently entered conviction for murder under the federal second degree murder statute. The Fifth Circuit cited *Hockenberry v. United States*, 422 F.2d 171 (9th Cir. 1970) for the proposition that only if the indictment could not support the sentence would a remand for resentencing be necessary. The Fifth Circuit committed clear error in refusing to remand Mrs. Lewis for resentencing in accordance with the appropriate sentencing guidelines for federal second degree murder.¹³

¹³ U.S.S.G. § 2A1.2.

Upon conviction under the Louisiana first degree murder statute, the district court imposed sentence pursuant to what it considered the applicable federal sentencing guideline for Louisiana first degree murder, that being federal first degree murder: U.S.S.G. 2A1.1. At the sentencing hearing (J.A. 54-55), the court found that through the presentence report (PR. ¶ 36 p. 14)¹⁴ the analogous sentencing guideline was that for federal first degree murder. The relevant base offense level was 43. (PR. ¶ 36, p. 14) The court then made a further determination that a two level enhancement for vulnerable victim pursuant to U.S.S.G. 3A1.2 was appropriate. (PR. ¶ 38, p. 14) As a result, the total base offense level was increased to level 45. Mrs. Lewis had no prior criminal history and was assigned a criminal history category of 1. (PR. ¶ 46, p. 15) However, with a base offense level of 45, the sentence required by the sentencing guidelines is life imprisonment without parole. The court recognized that the only sentence it could impose under the sentencing guidelines was one of life imprisonment; therefore, it imposed such a sentence. (J.A. 54-59). The U.S.S.G. abolished parole; therefore, the sentence was actually life imprisonment, without parole.¹⁵

On appeal, the Fifth Circuit specifically found that the only analogous federal criminal statute for which the defendant could have been convicted was federal second degree murder. The court then found that the sentence imposed by the district court, life imprisonment without parole, was within the maximum sentence amount allowed

¹⁴ The Presentence Report is under seal and it is not included in the Joint Appendix or as an appendix to this brief.

¹⁵ The district court imposed a sentence of life imprisonment. However, as parole was abolished with the adoption of the sentencing guidelines, the sentence is actually life imprisonment without parole. See also *United States v. Analla*, 975 F.2d 119 (4th Cir. 1992), *certiorari denied*, 507 U.S. 1033, 123 L.Ed.2d 476, 113 S.Ct. 1853 (1993).

by the federal statute, 18 U.S.C. § 1111(a). However, the case relied upon by the Fifth Circuit in determining that a remand for resentencing was not necessary, *Hockenberry*, supra, was a decision which predated the enactment and mandatory application of the sentencing guidelines. The Fifth Circuit also relied upon *United States v. Hall*, 979 F.2d 320 (3rd Cir. 1972), a Third Circuit decision which refused to remand for resentencing because "the sentence imposed on Hall was not higher than that which could have been convicted under the C.F.R." In *Hall*, supra, the sentence was only 45 days out of a statutory maximum of 6 months imprisonment; therefore, the court found no prejudice and no need for remand. *Hall*, supra, involved a crime which would be a petty offense under the sentencing guidelines, and, therefore, the sentencing guidelines would not even apply. 18 U.S.C. § 19 and 18 U.S.C. § 3553B and 28 U.S.C. § 994(w). The Fifth Circuit failed to consider the recent decisions of this Court which have interpreted the maximum statutory sentence to be the maximum applicable guideline range: *United States v. R.L.C.*, 503 U.S. 291, 117 L.Ed.2d 559, 112 S.Ct. 1329 (1992), and *United States v. Granderson*, 511 U.S. 39, 127 L.Ed. 611, 114 S.Ct. 1259 (1994). In these recent decisions, the definition of the statutory maximum sentence has been construed to mean the maximum sentence determined under the sentencing guidelines as applied by 18 U.S.C. Section 3553(a)(4). As noted earlier, the Fifth Circuit relied upon a pre-sentencing guidelines case, *Hockenberry*, supra, and a case in which the sentencing guidelines were not mandatory, *Hall*, supra.

In *R.L.C.*, supra, this Court was concerned with the provisions of the Juvenile Delinquency Act which determined the maximum term of imprisonment that would be authorized had the juvenile been tried and convicted as an adult. This court held that the limitation provided by that particular section of the Juvenile Delinquency Act

referred to the maximum sentence that could be imposed was the maximum sentence provided by the sentencing guidelines. In other words, this Court was faced with the question of which sentence to apply when faced with a conflict between the statutory maximum sentence and a maximum sentence provided by the guidelines which was less than the statutory maximum. The court resolved the issue in favor of finding the maximum sentence to be the maximum sentencing guideline because the sentencing guidelines and their application to sentencing is required by statute, 18 U.S.C. § 3553(b). This court also considered the question of whether to apply a statutory maximum when that maximum would exceed the maximum authorized by the sentencing guidelines themselves, and whether to apply such a maximum would be an unwarranted upward departure from the sentence provided by the sentencing guidelines. In *R.L.C.*, supra, the statutory maximum for the juvenile offender exceeded that which would be authorized under the sentencing guidelines. In resolving the issue, this Court found that the requirements of 18 U.S.C. § 3553(b) provide that the court is to impose a sentence within the range established by the sentencing guidelines, unless the court specifically finds aggravating or mitigating circumstances of a kind or to a degree not taken into consideration by the sentencing commission that would result in a sentence different than what was described by statute. In other words, the sentencing guidelines provide a range within which the sentence is to be imposed unless there are articulated circumstances requiring an upward departure or a downward departure. More importantly for the case at bar is that *R.L.C.*, supra, held that the upper limit of the proper guideline range becomes the maximum term for which a person may be committed to official detention absent circumstances that would warrant an upward departure pursuant to 18 U.S.C. § 3553(b).

In *Granderson*, supra, this Court was also faced with a similar question of applicability of differing sentencing

statutes: the guideline range for the underlying criminal offense or the maximum term of imprisonment imposed by statute. This Court was faced with determining what the appropriate term of imprisonment for probation revocation was: $\frac{1}{3}$ of the original applicable sentence or $\frac{1}{3}$ of the probationary sentence itself. In *Granderson*, supra, the issue was whether Mr. Granderson would be sentenced to $\frac{1}{3}$ of the probationary sentence of 5 years for probation revocation or whether his sentence of imprisonment was limited to $\frac{1}{3}$ of the maximum guideline range applicable to the original crime, 6 months imprisonment. The Court of Appeals for the Eleventh Circuit had found that the appropriate sentence was $\frac{1}{3}$ of the original 6 month maximum guideline for the original criminal violation and not $\frac{1}{3}$ of the 60 month probationary sentence pursuant to the sentencing guidelines. This Court affirmed the Eleventh Circuit's holding.

In the present case, the Fifth Circuit relied upon a pre-sentencing guideline case and on a case which did not require the application of the sentencing guidelines to hold that the sentence imposed upon DEBRA FAYE LEWIS was within the statutory maximum and, therefore, she could not be prejudiced by imposition of a sentence that exceeded the maximum guideline range for the underlying offense, but which was within the maximum sentence provided by statute.

The analysis of the Fifth Circuit is erroneous. DEBRA FAYE LEWIS had no prior criminal history and, therefore, was in a criminal history category I. (PR. ¶ 46, p. 15) The base offense level for federal second degree murder as provided by U.S.S.G. § 2A1.2 mandates a base offense level of 33. If the court enhances the base offense level 2 levels due to a vulnerable victim finding pursuant to U.S.S.G. § 3A1.1, which it did, the base offense level applicable to Ms. Lewis is increased to level 35. A base offense level of 35 with a criminal history category I generates a sentencing guideline range for a conviction of

federal second degree murder of 168 to 210 months. Therefore, the maximum term of imprisonment applicable to the crime for which Ms. Lewis was convicted is 210 months. However, the Fifth Circuit Court of Appeals affirmed a sentence of life imprisonment, without parole. It is noted that a base offense level of 43 mandates a sentence of life imprisonment, without parole. There is no explanation by the Fifth Circuit nor were any findings made or reasons given why a sentence based upon a base offense level of 43 is applied rather than the statutorily required base offense level of 35.

The Fifth Circuit held that "no remand was required for resentencing because such resentencing is only required where the district court has imposed a sentence that exceeds the maximum sentence the defendant would have received if sentenced under applicable federal statutes." 93 F.3d 1371 at 1379. However, the Sentencing Reform Act of 1984 amended 18 U.S.C. § 3553 and created sentencing guidelines which are mandatory. Therefore, the maximum sentence petitioner could receive for second degree murder was 210 months, not life imprisonment. There is no doubt that had the conviction in the district court been for federal second degree murder and the court imposed a sentence of life imprisonment without parole, the sentence would violate 18 U.S.C. § 3553(b) and require the appeals court to vacate the sentence and remand for resentencing due to the substantial prejudice to the defendant. Such a holding is acknowledged by this Court's decision of *Williams v. United States*, 503 U.S. 193, 117 L.Ed.2d 341, 112 S.Ct. 1112 (1993).

Williams, supra, held that where a district court departed from the sentencing guidelines for proper and improper reasons, the sentence must be vacated and remanded for resentencing unless it be shown that the errors of the district court would not have affected the sentence. In this case, the district court imposed a sentence which was 8 offense levels above the maximum

applicable sentencing guideline range and gave no reasons other than it used the federal sentencing guideline for federal first degree murder, U.S.S.G. § 2A1.1, which it believed to be appropriate based upon a conviction of Louisiana first degree murder (PR ¶ 36, p. 14). The Louisiana first degree murder statute required a sentence of imprisonment without parole.¹⁶ Since the Court of Appeals specifically found that the federal prosecution pursuant to the Assimilative Crimes Act was improper, the court could not use the conviction of a Louisiana criminal statute as the basis for an upward departure pursuant to the sentencing guidelines. More importantly, the Court of Appeals specifically held that the crime for which petitioner was guilty, and upon which the conviction was affirmed, was federal second degree murder. The sentencing guidelines applicable to federal second degree murder must be applied. To do otherwise would allow an upward departure upon an improper conviction using an improperly assimilated state criminal statute for conduct which had been previously proscribed by Congress and which is governed exclusively by the federal sentencing guidelines. This court in *Williams v. United States*, supra, found in 1946 that it would be improper to allow prosecution of a crime under state criminal laws which is specifically prohibited by applicable federal criminal statutes. This is ever more so when the state criminal statute imposes a more severe penalty than the applicable federal criminal statutes. In *Williams*, this Court held that since the federal criminal statute specifically proscribed the "precise act" sought to be prosecuted, a prosecution under the Assimilative Crimes Act using the state criminal offense was improper. To allow sentencing to be based upon a conviction of a state crime in violation of the "precise acts" limitations of the ACA and contrary to the purpose of the Sentencing Reform Act and sentencing guidelines will only ensure the imposition of unequal sentences in federal prosecutions; this is a result

¹⁶ 14 LA Rev.Stat.Ann. § 30(c).

the sentencing guidelines were specifically enacted to prevent.

This Court, in *Mistretta v. United States*, 488 U.S. 361, 101 L.Ed.2d 714, 109 S.Ct. 649 (1989) held that the sentencing guidelines promulgated pursuant to the Sentencing Reform Act of 1984 were constitutional. The purpose of the sentencing guidelines was to ensure uniformity of sentences within a specific guideline range, thereby ensuring that there would be fairly equal sentences imposed for the same crime within the federal system. To allow a greater sentence to be imposed upon DEBRA FAYE LEWIS because she was improperly prosecuted and convicted under the Assimilative Crimes Act of a state criminal statute would thwart the purpose of the sentencing guidelines. To allow such a sentence to stand would allow upward departures from the guidelines to the prejudice of a defendant without any articulated basis for the upward departure or recourse for correction, merely because the defendant was convicted under an improperly assimilated state criminal statute rather than under the appropriate federal criminal statute.

In the case at bar, a sentence of life imprisonment without parole exceeds the maximum sentencing guideline range for the crime of federal second degree murder upon which petitioner was convicted. There is no doubt that this sentence severely prejudices petitioner's rights. This prejudice requires that the conviction and sentence under the Assimilative Crimes Act for murder under the Louisiana first degree murder statute, La.Rev.Stat. Ann. 14:30A(5) be vacated. If this Court affirms the conviction imposed by the Fifth Circuit of federal second degree murder, the sentence affirmed by the Fifth Circuit exceeds the sentencing guidelines maximum guideline for federal second degree murder. In that respect, the sentence should be vacated and the case remanded to the Fifth Circuit Court of Appeals with the instruction that the sentence of life imprisonment without parole be vacated

and that the Fifth Circuit remand this matter to the district court for resentencing.

CONCLUSION

The opinion of the Fifth Circuit Court of Appeals that petitioner was improperly convicted under the Assimilative Crimes Act of Louisiana first degree murder should be affirmed.

The subsequent conviction by the Fifth Circuit Court of Appeals of federal second degree murder based upon the invalid indictment should be reversed and vacated and the matter remanded for new trial.

In the event this Court finds that the conviction of petitioner of federal second degree murder is proper, the sentence of life imprisonment without parole should be vacated and this matter remanded to the Fifth Circuit with instructions to vacate the sentence of life imprisonment without parole and to remand the case to the district court for resentencing.

Respectfully submitted,

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